**ABD HAMID JAAFAR**

**v.**

**SHAMSIAH DAN KELUARGA SDN BHD**

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[COMPANIES (WINDING-UP) NO: 28-22-2001]
16 JANUARY 2004

***COMPANY LAW:*** *Winding-up - Petition - Application based on inability of respondent to pay debt - Affidavit opposing petition - Whether affidavit admissible - Technical objection - Whether debt bona fide disputed - Companies Act 1965, s. 218(2)(a) - Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 41 r. 5(1) - Rules of the Court of Appeal 1994, r. 3A*

***CIVIL PROCEDURE:*** *Affidavits - Admissibility - Affidavit opposing petition to wind up - Contents of affidavit - Whether contents within personal knowledge of deponent - Technical objection - Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 41 r. 5(1) - Rules of the Court of Appeal 1994, r. 3A*

This was a petition by the petitioner to wind up the respondent under s. 218(2)(a) of the Companies Act 1965 ('the Act') on the ground of the respondent's inability to pay the sum of RM395,740.24 ('the said sum'), which was allegedly the balance due for work done by the petitioner for the respondent. The petition was based on a statutory demand; the petitioner had not obtained any judgment against the respondent for the said sum. The respondent then filed and served encl. 6 *ie*, its affidavit opposing the petition, arguing that it had a *bona fide* dispute against the petitioner's claim. The petitioner contended that encl. 6 was inadmissible under O. 41 r. 5(1) of the Rules of the High Court 1980 ('RHC') because encl. 6 could contain only such facts as the deponent was able, of his own knowledge, to prove. It was also alleged that even if encl. 6 were to be considered, it was still insufficient to establish any *bona fide* dispute against the debt.

**Held:**

**[1]** Paragraph 3 of encl. 6 averred that as the respondent's managing director, the deponent had access to the respondent's documents which were annexed to encl. 6, and that everything stated therein was true from the deponent's own knowledge. That being the case, encl. 6 had clearly complied with O. 41 r. 5(1) of the RHC. (p 386 f-g)

**[2]** By virtue of the parallel and equipollent provisions in r. 3A of the Rules of the Court of Appeal (Amendment) 2002 and O. 1A and O. 2 r. 3 of the Rules of the High Court (Amendment) 2002, the technical objection for the petitioner relating to the inadmissibility of encl. 6 had been superseded and thereby overruled. Therefore, encl. 6 had been properly sworn, filed and produced in court, and was admissible. (p 388 a & h)

**[3]** In disputing a debt, a respondent must satisfy the court that there is something that ought to be tried, either before the court itself, or in an action or by some other proceeding; in other words, the debt must be disputed on some substantial grounds. Reverting to all the affidavits and documentary exhibits filed herein, it was clear that the debt had been disputed on substantial grounds. (p 390 a & g)

*[Petition dismissed.]*

**Case(s) referred to:**

*Beauford Baru Sdn Bhd v. Gopalan Krishnan VK Gopalan [2002] 3 CLJ 686 HC* ***(refd)***

*Gilbert v. Endean [1878] 9 Ch D 259* ***(dist)***

*Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd [2002] 3 AMR 2647* ***(refd)***

*Jurupakat Sdn Bhd v. Kumpulan Good Earth [1973] Sdn Bhd [1988] 1 CLJ 649; [1988] 1 CLJ 618 HC* ***(refd)***

*Kassim Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors [1994] 3 CLJ 186 HC* ***(refd)***

*L'Office Cherifien Des Phospates v. Yamashita Shinnihon Steamship Co Ltd [1994] 1 AC 486* ***(refd)***

*Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC* ***(refd)***

*Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 HC* ***(refd)***

*Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC* ***(foll)***

*Megnaway Enterprise Sdn Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC* ***(refd)***

*Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 HC* ***(refd)***

*Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95* ***(refd)***

*MUI Bank Bhd v. Alkner Investments Pte Ltd [1990] 3 MLJ 385* ***(dist)***

*Perumahan Farlim (Penang) Sdn Bhd & Ors v. Cheng Hang Guan & Ors [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127 SC* ***(dist)***
*Re Great Britain Mutual Life Assurance Society [1880] 16 Ch D 246* ***(refd)***
*Re King's Cross Industrial Dwellings Co [1870] 11 LR Eq 149* ***(refd)***
*Re Koscot Interplanatery (UK) Ltd; Re Koscot AG [1972] All ER 829* ***(dist)***
*Re Nima Travel Sdn Bhd [1986] 2 MLJ 374* ***(refd)***
*S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 2 CLJ 152 HC* ***(dist)***
*SKT Kulanthayan Chettiar v. Koh Liak Phuang [1951] MLJ 149* ***(refd)***
*Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC* ***(refd)***
*Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 21 PC*
*Terrance Simon Marbeck v. Kerajaan Malaysia [2003] 6 CLJ 120 HC* ***(refd)***
*United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31* ***(foll)***
*Wan Othman Datuk Wan Yusof v. Kewangan Utama (M) Bhd [1993] 2 CLJ 570* ***(refd)***

**Legislation referred to:**
Companies Act 1965, ss. 217, 218(2)(a)
Companies (Winding Up) Rules 1972, r. 26
Contracts Act 1950, s. 75
Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 41 r. 5(1), (2)
Rules of the Court of Appeal 1994, r. 3A

*For the petitioner - Lim Whei Chun; M/s Lim Whei Chun*
*For the respondent - Avatar Singh; M/s Mohd Latip & Assocs*

*Reported by Suresh Nathan*

## JUDGMENT

**Petition**

Before me is the petitioner's petition in encl. (1) to wind up the respondent under s. 218(2)(a) of the Companies Act 1965 on ground of the respondent's inability to pay.

Unless the context otherwise requires, a reference to a section and a rule hereinafter is a reference to that section in the Companies Act 1965 and the rule in the Companies (Winding Up) Rules 1972 respectively.

**Factual Background**

The petitioner alleged that the respondent is indebted to him in the sum of RM395,740.24 ("the said sum"), for which the petitioner has served a three-week notice of demand dated 6 June 2001 issued and signed by its solicitor under s. 218(2)(a) ("statutory demand"), allegedly being the balance due for works done by the petitioner for the respondent from 1996 to 1998 in the development of 36 units of single-storey terrace houses on Lot 2075 Mukim of Bukit Lintang, Melaka ("the housing development").

The respondent did not pay the said sum and so the petitioner said that the respondent is unable to pay its debt.

These allegations of fact are contained in the petition. The petitioner has not obtained any judgment against the respondent for the said sum.

The respondent has filed and served encl. (5) ie, the notice of intention to oppose the petition, and encl. (6), the respondent's affidavit opposing the petition.

**Submission For Petitioner**

En. Lim Whei Chun, learned counsel for the petitioner, relied on r. 26 and submitted that by the petition, the petitioner has proved that the respondent is *prima facie* unable to pay its debt, and added that the respondent has failed to disprove the debt.

It was contended that "large chunks" of encl. (6) are inadmissible as under O. 41 r. 5(1) of the Rules of the High Court 1980, because encl. (6) may contain only such facts as the deponent is able of his own knowledge to prove and that it does not appear to be perfectly understood by the deponent, since it did not contain anything to indicate that the deponent reads English and understands perfectly the English exhibits annexed thereto. He cited *S. Ravi a/l G. Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1995] 2 CLJ 152, 154 a-b; *Perumahan Farlim (Penang) Sdn Bhd & Ors v. Cheng Hang Guan & Ors* [1989] 2 CLJ 967; [1989] 1 CLJ (Rep) 127; *Gilbert v. Endean* [1878] 9 Ch. D 259; *Re Koscot Interplanatery (UK) Ltd; Re Koscot AG* [1972] All ER 829; *Wan Othman bin Datuk Wan Yusof v. Kewangan Utama (M) Bhd.* [1993] 2 CLJ 572.

His stand is that the law demands that the natural person, author or maker of a document has to be identified, relying on *Mui Bank Bhd. v. Alkner Investments Pte Ltd* [1990] 3 MLJ 385; *S.K.T. Kulanthayan Chettiar v. Koh Liak Phuang* [1951] MLJ 149; and *Kassim bin Sulong & Anor. as the liquidator of 10 companies v. Guthrie Estates Holdings Ltd. & 8 Ors.* [1994] 3 CLJ 186.

He continued that since exhs. S3, S6 to S9 in encl. (6) were not made by the deponent, they should be struck out or disregarded as being inadmissible.

Hence, he stressed that the absence of the petitioner's contradicting under oath against the respondent's allegations in encl. (6) did not mean that the said allegations are deemed to be admitted by the petitioner, as the deeming of admission only usually but not always applies when the allegations are inadmissible.

It was argued that O. 1A and O. 2 r. 3 of the Rules of the High Court 1980 did not defeat his submissions as those rules came into effect well after the petition and applying those rules would cause injustice to the petitioner, and on the basis of *L'Office Cherifien Des Phospates v. Yamashita Shinnihon Steamship Co. Ltd* [1994] 1 AC 486, he said that injustice is an exception to the presumption of restrospectivity of precedural rules. He relied on *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997.

On the other hand, it was said that even if encl. (6) were to be considered, it was still insufficient to establish any *bona fide* dispute against the debt, and that the respondent's claim for late completion would fail, on the ground that losses cannot be claimed simpliciter but must be proved under s. 75 of the Contracts Act 1950.

Another contention is that the arbitration clause in the construction contract does not restrict or exclude the petitioner from exercising its statutory right to present a winding up petition against the respondent, and that no stay of proceedings should be granted to the respondent.

**Contention For Respondent**

En. Avatar Singh, learned counsel for the respondent, argued that the respondent has a *bona fide* dispute against the petitioner's claim, and that the petitioner's affidavit verifying the petition is not based on any judgment of the court or admission of the alleged debt or architect's or engineer's certificate.

He added that the petitioner is not a creditor under s. 217 and so has no *locus standi* to present this petition.

Another stand taken for the respondent is that where there is no judgment, the burden on the petitioner is a heavy one, and that the respondent has shown that there is something which ought to be tried.

He elaborated that the only basis for the petition is the statutory demand signed by the petitioner's solicitors, while the respondent has on four occasions disputed the petitioner's claim.

According to the respondent, O. 1A of the Rules of the High Court 1980 clearly operates against the petitioner's objection to the admissibility of encl. (6).

**Decision Of The Court**

*1. Basis For Petition*

This has been set out by the petitioner in encl. (2) ie, the affidavit verifying the petition to the effect that the allegations in the petition are true and correct. The only document which triggered off this petition is the statutory demand.

The statements of facts contained in the petition shall be *prima facie* evidence thereof under r. 26.

*2. Admissibility Of encl. (6)*

In the light of the submission presented for the petitioner, I shall deal with it here in order to determine the merits and substance thereof.

The case of *S. Ravi a/l Suppiah, supra*, cited for the petitioner concerns the proper construction of O. 41 r. 3 of the Rules of the High Court 1980, and not O. 41 r. 5(1) and (2), relied upon by the petitioner. That being the case, I am unable to see how my decision in *S. Ravi* is of any assistance to the petitioner.

In *Farlim*; and *Gilbert v. Andean, supra*, the issue before the respective court revolved around an interlocutory injunction and the preservation or keeping things in *status quo*. They have nothing to do with the admissibility of an affidavit in a winding up petition.

In *Re Koscot, supra*, at the hearing of petitions to wind up two companies, it was sought to adduce evidence consisting of two documents relating to the practices of an American company. These two documents were a letter and a summary of part of a report, but there was nothing to indicate who had prepared the report, and the summary contained no authenticating name. These documents were exhibited to an affidavit for the purpose of establishing the truth of their contents. Megarry J held that neither document was admissible in evidence.

A comparison of the facts in *Re Koscot, supra*, and those in the petition before me clearly shows a distinct difference. Para 3 of encl. (6) avers that as the respondent's managing director, the deponent, has access to the respondent's documents which were annexed to encl. (6); and that everything stated therein is true from the deponent's own knowledge. That being the case, I am of the view that encl. (6) has clearly complied with O. 41 r. 5(1) which reads as follows:

> **5. Contents of affidavit (O. 41 r. 5)**
>
> (1) Subject to Order 14 rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

In *Mui Bank, supra*, counsel for the plaintiff raised a technical point of evidence that the allegations deposed to by the deponent were hearsay as the deponent has failed to identify the specific officers from whom the deponent had obtained the information, as a result of which Chao Hick Tin JC Singapore (as he then was) disregarded this part of the evidence.

The position before me is different as the deponent has affirmed that he has own knowledge of the allegations of fact deposed to in the affidavit.

In *Kassim bin Sulong, supra*, Zakaria Mohd Yatim J (later FCJ) struck out an affidavit of a deponent who had not disclosed the source of the information deposed to in his affidavit which did not comply with the requirements of O. 41 r. 5(2) of the Rules of the High Court 1980.

Affidavits containing matters which were not within the personal knowledge of the deponent and which the deponent was not of his own knowledge able to prove were held to be inadmissible by Richard Malanjum JC (now JCA) in *Wan Othman, supra.*

In the light of the deponent's own knowledge affirmed in encl. (6), I am of the view that the cases cited for the petitioner are not supportive of the petitioner's contention that encl. (6) is inadmissible.

*3. Technical Objection*

In my view, the petitioner's objection to the admissibility of encl. (6) for alleged non-compliance with the requirements of the rules of court is strictly a technical objection.

In *Mui Bank, supra*, which was cited for the petitioner, a similar objection was raised. Chao Hick Tin JC (as he then was) considered that objection as "a technical point of evidence" (see p. 790).

As we move towards the era of facilitating the process of litigation, the raising of preliminary objections on technical grounds would certainly and clearly be a thing of the past. The Court of Appeal in *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 through the authoritative judgment of Ahmad Fairuz JCA (now CJ Malaysia) expressly stated that the preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving, thereby overruling the procedural technical objection.

In *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645, Mohtar Abdullah FCJ (as he then was) observed:

> The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. ... The Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

The principles enunciated in the aforesaid judgments are further manifested in the parallel and equipollent provisions in r. 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) and O. 1A and O. 2 r. 3 of the Rules of the High Court (Amendment) 2002 (PU(A 197/2002) both of which came into force on 16 May 2002 in the following terms:

| | |
|---|---|
| Preliminary objection on the ground of non-compliance shall not be allowed. | 3A. A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. |

**Court or Judge shall have regard to justice**

1A. In administering any of the Rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

**Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)**

5. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good: see *Beauford Baru Sdn Bhd v. Gopalan Krishnan VK Gopalan* [2002] 3 CLJ 686; *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock* [2003] 5 CLJ 103, *Terrance Simon Marbeck v. Kerajaan Malaysia* [2003] 6 CLJ 120, 125.

In the circumstances, I hold that the technical objection raised for the petitioner relating to the inadmissibility of encl. (6) has been superseded by the aforesaid amendments and is hereby overruled.

I therefore hold that encl. (6) has been properly sworn, filed and produced in court and is admissible.

*4. Duty To Consider encl. (6)*

In *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24, it was authoritatively expounded by the Privy Council that in winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him, unless some opposing party has applied for cross-examination of the deponent and that application has been granted and the deponent does not attend.

Apart from raising the objection to the admissibility of encl. (6), there was no attempt whatsoever by the petitioner to apply to cross-examine the deponent of encl. (6). That being the case, I am duty bound to consider encl. (6).

*5. Effect of Statutory Demand*

In *Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd (formerly known as Jaya Chloride Standby Power Sdn Bhd)* [2000] 6 CLJ 290, the facts are identical to those in the petition before me, except for the amount of the alleged debt. The petition there was based on a statutory demand notwithstanding that the petitioner had not obtained judgment for the debt. Mohd Ghazali J (now JCA) in dismissing the petition and following *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303, held that the statutory demand is merely an equivalent of a letter of demand to the respondent to warn it of an impending petition and to invoke the presumption of inability to pay a debt and the petitioner would still have to prove that it was a creditor of the respondent and that the amount stated therein was due and owing to it.

His Lordship, again following *Sri Hartamas, supra,* then held that the statutory demand must be related to a specified debt the amount of which cannot be seriously questioned and where the amount of the debt is questionable or suspect, in the absence of any judgment to support such a debt, the petition should be dismissed.

The learned judge added that a winding up petition cannot be used as a legitimate means of seeking to enforce payment of a debt which has not been clearly determined and that to hold otherwise would be to put a court, faced with a winding up petition on a debt for which judgment had not been obtained, to the unnecessary strain of having to first establish whether the debt claimed is the actual amount due and owing, based on the evidence available.

*6. Is The Alleged Debt Disputed On Substantial Grounds?*

Where a debt is crystal clear ie, upon clear uncontroverted evidence or acknowledgment of indebtedness on a quantified or liquidated sum, it would waste the civil courts' valuable time to require that the petitioner first proceed under common law and secure judgment on the debt before proceeding to petition to wind up the company: per Vincent Ng Kim Khoay J in *Imbangan Utama Sdn Bhd v. Lotan Engineering Works Sdn Bhd* [2002] 3 AMR 2647.

In disputing the debt, the respondent must satisfy the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding. In other words, the debt must be disputed on some substantial grounds: per Hashim Yeop A Sani CJ (M) in *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95, 97, following *Re King's Cross Industrial Dwellings Co* [1870] 11 LR Eq 149; and the dictum of Jessel MR in *Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246.

The allegations of facts in encl. (6) are to the effect that *vide* Melaka High Court Civil Suit No. 22-83-1998, the petitioner has claimed for a sum of RM649,392.56 from the respondent pursuant to an agreement for the housing development to which the respondent has filed the defence and counterclaim.

On 10 December 1999, the civil suit was struck out by the court, without any attempt by the petitioner to reinstate the same. Instead, the petitioner has issued the statutory demand for a different sum.

There are allegations and counter-allegations relating to the completion of the housing development and site meetings have been held without any conclusive results. There have also been allegations of payments and indeed excess payments made by the respondent to the petitioner for the housing development.

In *Jurupakat Sdn Bhd v. Kumpulan Good Earth [1973] Sdn Bhd* [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618, there was no judgment debt and the alleged debt claimed by the petitioner has been disputed by the respondent. Zakaria Yatim J (later FCJ) held that the petitioner was not a creditor under s. 217 and so has no *locus standi* to file the petition. (See also the judgment of Abu Mansor J (later FCJ in *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451.

In *Re Nima Travel Sdn. Bhd.* [1986] 2 MLJ 374, there was a winding up petition in respect of a debt which was *bona fide* disputed. Shankar J (later JCA) held that the proper course for the petitioner was to establish the debt by filing the action to have the matter adjudicated upon in the usual way.

Reverting to all the affidavits and documentary exhibits filed herein, it is clear to me that the debt has been disputed on substantial grounds.

*7. Conclusion*

On the foregoing grounds, I hold that the petition herein is wholly without merits and is hereby dismissed with costs.